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ABOLISHING EXEQUATUR IN THE EUROPEAN UNION: THE EUROPEAN ENFORCEMENT ORDER

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1. INTRODUCTION

On 21 April 2004 the European Parliament and the Council of the European Union adopted the Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims.[1] This Regulation entered into force on 21 January 2005 and became applicable as from 21 October 2005. The purpose of the Regulation is to simplify cross border recognition and enforcement of certain judgments, court settlements and authentic instruments in civil and commercial matters in the European Union. The simplification is realized by abolishing the intermediate procedures for recognition and enforcement in the Member State of enforcement because the original decision is certified as a European Enforcement Order in the Member State of origin. This simplification results in a free circulation of certified judgments, court settlements and authentic instruments throughout all Member States, with the exception of Denmark, without any need for an intermediate procedure for recognition and enforcement.

In this article a short background to the EEO Regulation is first given, as well as a brief review of the situation before the EEO Regulation became applicable. The EEO Regulation is then considered. Finally, the question of added value of this Regulation is discussed in the light of the existing and proposed instruments, as well as the possibilities of partial harmonization of the procedural laws of the Member States.

2. BACKGROUND OF THE EEO REGULATION

The European Commission presented on 18 April 2002 the first proposal for a Regulation on a European Enforcement Order.[2] The proposal was based on Articles 61 and 65 EC according to which measures in the field of judicial cooperation in civil matters with cross border implications are to be taken to improve and to simplify the recognition and enforcement of decisions in civil and commercial matters. In the Conclusions from the European Council Meeting in Tampere (Finland) on 15 and 16 October 1999 the Council already endorsed the principle of mutual recognition of decisions in civil and commercial matters as a cornerstone for the creation of a genuine judicial area. The principle of mutual recognition has been specified in the programme of measures for implementation of this principle.[3] The Council has adopted this programme on 20

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1. *OJ* 2004 L 143, pp. 15-39. Hereinafter this Regulation will be referred to as the EEO Regulation. See on this Regulation Th. Rauscher, *Der Europäische Vollstreckungstitel für unbestrittene Forderungen* [The European Enforcement Order for uncontested claims] (Munich, Sellier European Law Publishers 2004) and M. Zilinsky, *De Europese Executoriale Titel* [The European Enforcement Order], PhD-thesis *Vrije Universiteit* Amsterdam (Deventer, Kluwer 2005).
2. COM (2002) 159 def.
3. *OJ* 2001 C 12, p. 1.

November 2000. According to this programme the abolition of the exequatur – i.e., the declaration of enforceability of foreign judgments in the state of enforcement – is to be established by the creation of a European Enforcement Order for uncontested claims. Due to the differences in the law of civil procedure of the Member States the acceleration of the recognition and enforcement of judgments is – as it is stated in the Conclusions of Tampere – necessary for proper functioning of the internal market. By simplifying the recognition in cross border cases within the European Union the costs of enforcement will be reduced. However, the enforcement procedures still remain to be governed by the national law of the Member State of enforcement.

The Commission's proposal for a Regulation on a European Enforcement Order has been heavily discussed in the European Parliament and in the meetings of the Civil Law Committee of the Council. This discussion had led to the amended proposal[4] which was – after small changes – finally adopted on 21 April 2004. There are three main questions which have been subject of discussion. First of all, the scope of the Regulation, secondly, the applicability of the Regulation – i.e., the definition of the notion 'uncontested claim' and the question whether the certified decision has to be final – and, thirdly, the question of safeguards which are to be given to the defendant.

It is also to be pointed out that since the EEO Regulation has been adopted on 21 April 2004, it has become *acquis communautaire* before the accession of the new 10 Member States to the European Union on 1 May 2004. As a part of the *acquis communautaire* the Regulation is also applicable in the new Member States.[5]

3. BRUSSELS I REGULATION AND THE BRUSSELS CONVENTION

Recognition of foreign judgments within the European Union has been already accomplished by the Brussels Convention of 1968.[6] According to this Convention a judgment of a court of a contracting state can be enforced in another Member State after it has been declared enforceable in the state of enforcement. On 1 March 2002 the Brussels Convention has been 'transformed' into

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4. COM (2003) 341 def.

5. The 10 Member States which have acceded to the European Union on 1 May 2004 are: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta and (Greek) Cyprus.

6. *OJ* 1971 L 299, p. 32. The Brussels Convention is amended in view of different Accession Treaties, lately by the accession of Austria, Finland and Sweden (*OJ* 1997 C 15, p. 1). See on the case law and further developments P. Vlas, M. Zilinsky and F. Ibili, 'Civil Jurisdiction and Enforcement of Judgments in Europe', 52 *NILR* (2005) p. 109 as well as the previously in the *NILR* published reviews of case law on the Brussels Convention.

the Brussels I Regulation. However, the Brussels Convention remains in force between the contracting states and Denmark, since Denmark is not bound by the Brussels I Regulation. According to the Danish protocol to the Treaty of Amsterdam, Denmark is not bound by the measures based on Title IV of the EC Treaty.[7]

Although it could be suggested that by the adoption of the EEO Regulation the Brussels I Regulation has been superseded, it has to be borne in mind that the former Regulation shall not affect the latter one. Since the EEO Regulation has an optional character, the creditor can choose which instrument he wishes to use in case of cross border enforcement. For the certification of a judgment as a European Enforcement Order it is necessary that certain requirements are fulfilled. If it is uncertain whether these requirements are fulfilled, the creditor can still choose for the Brussels I Regulation to enforce a judgment of a court of a Member State in another Member State. The EEO Regulation is not applicable in relationship to Denmark.[8] A certified judgment cannot be enforced in the simplified way in Denmark, nor can a judgment of a court in Denmark be certified as a European Enforcement Order. For the enforcement of judgments of courts of the Member States in Denmark and for the enforcement of judgments of the Danish courts in other Member States the Brussels Convention still applies.

The Brussels I Regulation also remains applicable to determine the jurisdiction of a court of a Member State. The EEO Regulation does not deal with the question of jurisdiction. It only creates a procedure by which a judgment, a court settlement or an authentic instrument can be certified as a European Enforcement Order.

According to Article 33(1) of the Brussels I Regulation a judgment given in a Member State shall be recognised in another Member State without any special procedure being required. For the enforcement of this judgment in another Member State an exequatur in the Member State of enforcement is necessary. The exequatur can be rendered on an application of any interested party. A judgment is declared enforceable immediately after the formal requirements are completed. Contrary to the Brussels Convention the court seized for an exequatur does not examine the grounds for non-recognition, nor may the court review the judgment as to the substance. Any interested party may appeal against the decision on application for an exequatur. In the appeal proce-

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7. The Brussels Convention is not applicable in the relationship between Denmark and the 'new' Member States, because the latter states are not party to this Convention. Although in accordance with Art. 5(2) of the Act concerning the accession of these Member States to European Union, they are obliged to accede to all conventions based on Art. 293 EC, the question of accession to the Brussels Convention might have been superseded by the Agreement between the European Community and Denmark extending the provisions of the Brussels I Regulation to Denmark (*OJ* 2005 L 299, p. 61).

8. Cf., Art. 2(3) of the Regulation as well as the 25th recital of the Preamble to the EEO Regulation.

dure the court seized examines the grounds for non-recognition. Recognition of a judgment may only be refused if the requirements for the application of the grounds for non-recognition are fulfilled. Under the Brussels I Regulation these grounds have been slightly limited compared to the Brussels Convention. However, in legal practice it was argued that the possibility of lodging an appeal against the exequatur in the state of enforcement still creates a possibility for *mala fide* debtors to obstruct the enforcement of a judgment rendered against them. Therefore, the idea of simplifying the exequatur procedure has been introduced as well as the idea of abolishing the exequatur procedure in the state of enforcement.[9]

4. EUROPEAN ENFORCEMENT ORDER – AN INTRODUCTION

As already mentioned, certain judgments can be certified as a European Enforcement Order in the Member State of origin. In accordance with Article 5 of the EEO Regulation a certified judgment shall be recognised in other Member States without any need for a declaration of enforceability in the Member State of enforcement and without any possibility of opposing its recognition. This system restricts the possibility of delaying the enforcement, since the intermediate procedure in the Member State of enforcement is abolished. One could say that by the certification of a judgment as a European Enforcement Order the judgment becomes equal to the judgment of a court of the Member State of enforcement.

In order to ensure full respect of the right to a fair trial principle the EEO Regulation takes into account the fundamental rights with regard to civil procedure, especially the principle of fair trial. This is realized by the introduction of a system of minimum standards for uncontested claims procedures. In certain cases a judgment can only be certified if the procedure in which the judgment has been rendered, fulfils these standards. According to the 19th recital of the Preamble to the EEO Regulation the Regulation does not imply the obligation for the Member States to adopt the minimum standards in their national laws of civil procedure. However, the Member States are recommended to do so as to make available a more efficient and rapid enforcement of judgments in other Member States. If the national law of a Member State will not comply with the standards set out in the Regulation, the judgments rendered in that Member State cannot be certified as a European Enforcement Order.

9. Zilinsky, op. cit. n. 1, at p. 17 and p. 241.

5. SCOPE OF APPLICATION OF THE EEO REGULATION

The EEO Regulation applies to judgments on uncontested claims rendered by courts of Member States in civil and commercial matters. It is also applicable to court settlements and to authentic instruments on uncontested claims in civil and commercial matters.

According to Article 2 the Regulation applies in civil and commercial matters, whatever the nature of the court or tribunal. The Regulation excludes from its material scope revenue, customs or administrative matters, as well as matters regarding the liability of a state for acts and omissions in the exercise of state authority (*acta iure imperii*). The second paragraph of Article 2 of the EEO Regulation is the same as that of the Brussels I Regulation. Family law matters, bankruptcy and related procedures, social security as well as arbitration are also excluded.[10]

The material scope of the EEO Regulation is the same as that of the Brussels I Regulation, although in Article 2(1) of the EEO Regulation the liability of the state as regards *acta iure imperii* is excluded. In my opinion the exclusion was not necessary. Since the EEO Regulation has a complementary character to the Brussels I Regulation,[11] the case law of the EC Court on interpretation of the notions from the latter Regulation applies to the interpretation of the notions of the former one. It is settled case law that the Brussels Convention does not apply to cases where either of the parties has acted in the exercise of the public powers.[12] This means that if the state is acting on the base of the state authority, the matter does not fall within the notion 'civil and commercial matters' in the meaning of the Brussels I Regulation.

Only judgments, court settlements and authentic instruments on an uncontested claim can be certified as a European Enforcement Order. According to Article 26 the Regulation applies to judgments given, to court settlements approved or concluded and to documents formally drawn up or registered as authentic instruments after the entry into force of the Regulation. It has been

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10. Although family law matters are excluded, it is to be mentioned that maintenance matters do fall within the scope of the EEO Regulation. The term 'civil and commercial matters' is to be interpreted in the same way as under the Brussels I Regulation.

11. The purpose of both Regulations is to simplify the recognition and enforcement of judgments in civil and commercial matters. See also the 20th recital of the Preamble of the EEO Regulation which states that in case of enforcement of a judgment on an uncontested claim the creditor can choose either for the EEO Regulation or for the Brussels I Regulation.

12. ECJ Case C-271/00, *Gemeente Steenbergen* v. *Luc Baten*, [2002] *ECR* I-10489 and ECJ Case C-266/01, *Préservatrice foncière TIARD SA* v. *Staat der Nederlanden*, [2003] *ECR* I-4867. See more on these cases Vlas, Zilinsky and Ibili, loc. cit. n. 6, at p. 110. According to Jayme and Kohler this explicit exclusion of the liability of the state as regards *acta iure imperii* has been inserted into this provision on insisting of the German delegation. See more E. Jayme and C. Kohler, 'Europäisches Kollisionsrecht 2004: Territoriale Erweiterung und methodische Rückgriffe', 24 *IPRax* (2004) p. 486 (note 72).

previously mentioned that the Regulation entered into force on an earlier date (21 January 2005) than the date at which it became applicable (21 October 2005). This means, for example, that a judgment which has been given by a German court on 24 January 2005, can be certified as a European Enforcement Order after 21 October 2005. The same applies to the court settlements concluded after the date of entry into force or to the authentic instruments drawn up and registered after this date.

Article 4 of the EEO Regulation gives a definition of the terms used in the Regulation. The notion 'judgment' is to be understood as any judgment given by a court or tribunal of a Member State, whatever the judgment may be called.[13] According to the settled case law of the EC Court as regards this term in the Brussels Convention, the court has to act on its own motion to render a judgment. This means that an approval by a court of a settlement between parties is not a judgment within the meaning of the Brussels Convention. In case of a court settlement the approval of the settlement cannot be certified as a European Enforcement Order but the settlement itself. See in this respect also Article 24 of the EEO Regulation which states that a *settlement* concerning an uncontested claim which has been approved by a court or concluded before a court in the proceedings, can be certified.

The claim on which the judgment, the court settlement, or the authentic instrument is based has to be uncontested. The notion 'uncontested' is defined in Article 3 of the Regulation. There are two categories of uncontested claims which can be distinguished: the claims to which the debtor has expressly agreed to and those which became uncontested because of a default of debtor's appearance in the proceedings. The debtor can agree to a claim by admission or by a settlement which has been approved by a court or concluded before a court in the course of proceedings (Art. 3(1)(a)). The debtor also can agree to a claim in an authentic instrument (Art. 3(1)(d)). The claim additionally becomes uncontested if the debtor does not object to it in the course of the court proceedings in compliance with the relevant procedural requirements under the law of the Member State of origin. Whether, for example, the claim becomes uncontested by non-appearance of the debtor, is to be determined by the law of the court of the Member State of origin. Article 3(1)(c) states that the claim is also to be considered uncontested in the case where the debtor initially objected to the claim in the course of the court proceedings but he does not appear or is not being represented at a court hearing regarding this claim. Such conduct has to amount to a tacit admission of a claim under the law of the Member State of origin. This paragraph is especially drawn up for the purposes of the *Mahnverfahren* under the German law. The *Mahnverfahren* is a special procedure to obtain a payment court order. In the first stage of this procedure the debtor has the possibility to contest the claim. If he does so, the proceedings shall continue

13. Cf., Art. 32 of the Brussels I Regulation where the same definition is given.

in accordance with the rules of ordinary civil procedure. If the debtor does not enter an appearance in the proceedings, the claim can still be considered as uncontested within the meaning of Article 3(1)(c).[14]

In accordance with Article 3(2) of the EEO Regulation a certification of a decision which has been given on a challenge to a judgment certified as a European Enforcement Order, is possible. If a certified judgment is challenged, the new decision also can be certified. After a judgment is rendered on the challenge, it is to be determined separately whether this latter judgment can be certified.

The EEO Regulation does not require the debtor being resident in a Member State. Every judgment of a court of a Member State can be certified as a European Enforcement Order if the requirements laid down in the Regulation are met. This means that a judgment rendered by a Dutch Court against a Russian company can be certified by a Dutch court as a European Enforcement Order. If this company has assets in Germany, the certified judgment can be easily enforced in Germany under the EEO Regulation.

6. CERTIFICATION AS A EUROPEAN ENFORCEMENT ORDER

In accordance with Article 5 of the Regulation a judgment which has been certified as a European Enforcement Order in the Member State of origin, shall be recognised and enforced in the other Member States without any need for a declaration of enforceability and without any possibility of opposing its recognition. The EEO Regulation creates a procedure in the Member State of origin which replaces the exequatur procedure in the Member State of enforcement which is necessary in case of enforcement of a judgment under the Brussels I Regulation. The certification procedure under the EEO Regulation is an *ex parte* procedure. This means that the debtor is not heard on the application for the EEO certificate. According to Article 10 of the EEO Regulation the debtor is given a possibility to challenge the certificate. However, these possibilities are strictly limited.

It is to be pointed out that a court of a Member State is not allowed to certify a judgment on its own motion. According to Article 6(1) an application for such a certificate is necessary. The Article does not provide who has to request the EEO certificate, however, in my opinion in most cases the creditor will apply for the certification. At any time the application can be submitted to the court of origin. This means that there are three moments at which an EEO certificate can be applied for. The creditor can already apply for the certification in the document instituting the proceedings. He also can request the certification in the

14. R. Wagner, 'Die neue EG-Verordnung zum Europäischen Vollstreckungstitel', 25 *IPRax* (2005) p. 193.

course of the court proceedings. Finally, the certification can be applied for after a judgment is rendered. In my view, the latter way of application for the EEO certificate will be the most common. If the creditor requests the certification in the document instituting the court proceedings, the debtor becomes aware of the possibility of the certification which may result in a simplified enforcement of the judgment in another Member State. Therefore the possibility exists that the debtor obstructs the enforcement of the certified judgment.[15]

The EEO Regulation does not determine which court may certify a judgment as a European Enforcement Order. According to Article 6(1) the *court of origin* shall certify the judgment upon an application. Article 4(6) states that the *court of origin* means the court or tribunal seized of the proceedings at the time of fulfilment of the conditions for a claim being uncontested within the meaning of Article 3(1)(a), (b) or (c) of the EEO Regulation. The Member States are free to determine in their national laws which court or judge may issue the EEO certificate to a judgment. Since the Regulation states that the *court* certifies the judgment, it is possible that another judge than the judge who has rendered the judgment issues the certificate.[16]

The judgment, which is to be certified, has to be enforceable in the Member State of origin. Since the Regulation does not require the judgment to be final, a certification of a judgment containing provisional measure, as well as a certification of a provisional enforceable judgment is possible.[17] The question whether a judgment is enforceable, is to be answered according to the law of the Member State of origin. The Regulation does not give an answer to the question at which moment the judgment has to be enforceable. Is this the moment of the certification or the moment of rendering the EEO certificate? Or is it sufficient that the judgment becomes enforceable at a latter moment? In that case the EEO certificate could be rendered but effect to it could be only given from the moment the judgment becomes enforceable.

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15. Under Arts. 41 and 42 of the Brussels IIA Regulation certain judgments concerning the rights of access and concerning the return of the child can be also certified in the Member State of origin. A certified judgment shall be recognised and enforced in another Member State without any need for a declaration of enforceability and without any possibility of opposing the recognition. Contrary to the EEO Regulation the judge issues the certificate in a cross border situation *ex officio*. Otherwise, one of the parties can request for a certification. See on the Brussels IIA Regulation Th.M. de Boer, 'Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation', 49 *NILR* (2002) p. 307 at p. 333.

16. Stein has pointed out that there is no *Personalunion* between the judge giving the judgment and the judge issuing the certificate. See A. Stein, 'Der Europäische Vollstreckungstitel für unbestrittene Forderungen tritt in Kraft – Aufruf zu einer nüchternen Betrachtung', 24 *IPRax* (2004) p. 181.

17. The 2002 European Commission's proposal for a Regulation on a European Enforcement Order (COM 2002 (159) def.) required the judgment to be final. It has been argued that neither the Brussels I Regulation nor the Brussels Convention requires the judgment to be final. The requirement of a judgment being final would be unpractical and it would also be contrary to the purpose of the Regulation to accelerate cross border enforcement. See Zilinsky, op. cit. n. 1, at p. 156.

The judgment may not conflict with certain rules on jurisdiction as laid down in Sections 3 and 6 of Chapter II of the Brussels I Regulation. Section 3 gives provisions on jurisdiction over the insurance contracts; Section 6 contains exclusive jurisdiction rules. The non-compliance with these rules on jurisdiction also leads to non-recognition of a judgment under the Brussels I Regulation.[18] If the debtor is a consumer, a judgment rendered against such a debtor having domicile in a Member State can only be certified as a European Enforcement Order if the claim is uncontested within the meaning of Article 3(1)(b) or (c) of the EEO Regulation and the judgment is rendered by a court of the Member State of the debtor's domicile. This means that a debtor being consumer is protected in the proceedings on a claim, as well as in the proceedings upon an application for a European Enforcement Order. If the matter falls within the scope of Section 4 of Chapter II of the Brussels I Regulation (jurisdiction over consumer contracts) a court of a Member State is obliged to determine its jurisdiction according to the provisions of this Section. According to Article 16(2) of the Brussels I Regulation proceedings against a consumer may only be brought in the courts of the Member State where the consumer is domiciled. However, this does not affect the possibility to bring a counter-claim in a court in which a claim is pending in accordance with the provisions of Section 4 of Chapter II. According to Article 6(1)(d) of the EEO Regulation a judgment against a debtor being a consumer having domicile in a Member State can only be certified if it is rendered by a court of a Member State of the debtor's domicile. Bearing in mind that the jurisdiction provisions of the Brussels I Regulation are mandatory for the courts of all Member States, with the exception of Denmark, the restriction in Article 6(1)(d) of the EEO Regulation is unnecessary and – in my opinion – unsystematic. If a court of the Member State of origin fully complies with the jurisdiction rules over consumer contracts from the Brussels I Regulation, an extra protection in the certification procedure in the EEO Regulation is not necessary. The EEO Regulation should have required the judgment not to conflict with the jurisdiction provisions of Sections 3, 4 and 6 of Chapter II of the Brussels I Regulation, as it is the case in Article 35(1) of the Brussels I Regulation.

If the judgment is given on a claim which is uncontested within the meaning of Article 3(1)(b) or (c) of the EEO Regulation, i.e., if the debtor did not object to the claim or if the debtor did not enter an appearance in the proceedings on a claim, certain formal requirements have to be met in the court proceedings on this claim. The requirements are set out in Chapter III of the EEO Regulation. They regard the service of the document which has instituted the proceedings on a claim, due information of the debtor about the claim and certain procedural standards for contesting the claim and challenging the judgment in the Member State of origin. It has to be borne in mind that according to the 19th recital of

18. Cf., Art. 35(1) of the Brussels I Regulation.

the Preamble of the EEO Regulation the Member States are not obliged to adapt their national procedural laws to the formal requirements as set out in Chapter III of the Regulation. However, if the national law does not comply with this Chapter, in case of a claim being uncontested within the meaning of Article 3(1)(b) or (c) of the Regulation the certification of a judgment regarding this claim will not be possible.

7. MINIMUM STANDARDS FOR UNCONTESTED CLAIMS PROCEDURE

The requirements of Chapter III of the EEO Regulation have to be met in all proceedings on an uncontested claim within the meaning of Article 3(1)(b) or (c). According to Article 12(2) these requirements apply to the issuing of the EEO certificate as well as to the issuing of a new certificate following a challenge to a certified judgment, where at the time of that decision, the conditions of the previously mentioned Articles are fulfilled.

The minimum standards from Chapter III of the Regulation apply to the service of the document instituting the proceedings as well as to the service of the summons to a court hearing. The Regulation distinguishes between two forms of service: the service with proof of receipt by the debtor and the service without such a proof. It is to be pointed out that the Regulation does not deal with the service itself. It only gives methods of service which are accepted for the purposes of a certification of a judgment as a European Enforcement Order. The service of the document instituting the proceedings or the service of the summons to a hearing is carried out according to the applicable provisions of the law of the court of a Member State where the proceedings have been instituted. This means that in case of service of a document in civil and commercial matters within the European Union the EC Service Regulation might be of importance.[19] Otherwise, the Hague Service Convention might apply.[20] There are no provisions on service in the EEO Regulation. See in this respect also Article 28 of the Regulation that states that the EEO Regulation shall not affect the application of the EC Service Regulation. The provisions on service in the EEO Regulation are not aimed at harmonization of the laws on service of the different Member States. This is the reason why there is in every Member State a service method which lacks conformity with the methods mentioned in the

19. Council Regulation (EC) No 1348/2000 of 29 May 2000 on service in the Member States of judicial and extrajudicial documents in civil or commercial matters, *OJ* 2000 L 160, p. 37.

20. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on 15 November 1965. See on this Convention J.W. Soek, 'The Service of Documents Abroad and the Protection of defendants Resident Abroad', 29 *NILR* (1982) p. 72.

Regulation. More than ever alertness by effecting the service is required.[21] One may criticise the fact that the Regulation is not dealing with the service of the document and that it only gives service methods that are permitted in view of the certification as EEO.

It has been already mentioned that the EEO Regulation does not require the debtor being resident in a Member State. This means that if the creditor wants his judgment being certified as a European Enforcement Order, while the debtor is resident in a non-Member State the minimum standards have to be met. This might be a problem if there is no international instrument as regards cross border service between the Member State, where the proceedings have been instituted, and the state, where the debtor is resident.[22]

Article 15 of the EEO Regulation extends the applicability of the provisions on service methods. The service of the document instituting the proceedings or the service of the summons for a hearing may also be effected on a representative of a debtor. There is no definition of the notion 'representative' in the Regulation. However, the 16th recital of the Preamble of the EEO Regulation might be of some help as it states that Article 15 is meant for situations where the debtor cannot represent himself in court – for example in case of a minor who is to be represented by his legal representative, in most cases one of his parents – or where the debtor has authorised another person to represent him in the specific court proceedings – in most cases a lawyer. The question whether the document may be served on the representative, is still to be answered in accordance with the law of the state where the service is effected.[23] In my opinion Article 15 does not oblige the Member States to enable the service on a representative. It provides only that service may be effected.

There is no ranking between the different service methods mentioned in the EEO Regulation. The creditor may decide by which method the document is to be served. The 2002 European Commission's proposal distinguished between the service methods. Service without proof of receipt by the debtor has been made possible if service with proof of receipt has been unsuccessful. Under the EEO Regulation there is no difference between these two methods. However,

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21. P. van der Grinten, 'Abolishing Exequatur in the European Union: An Alternative', in P. van der Grinten and T. Heukels, eds., *Crossing Borders, Essays in European and Private International Law, Nationality Law and Islamic Law in Honour of Frans van der Velden* (Deventer, Kluwer 2005) p. 71 at p. 78.

22. The service of document instituting the proceedings can also give rise to problems in national cases, i.e., the creditor and the debtor are resident in the same Member State. In case of an application for an EEO certificate the requirements of the EEO Regulation have to be fulfilled. A. Stein, 'Der Europäische Vollstreckungstitel für unbestrittene Forderungen', 15 *EuZW* (2004) p. 679 at p. 680.

23. See also J. Kropholler, *Europäisches Zivilprozeßrecht. Kommentar zu EUGVO, Lugano-Übereinkommen und Europäischem Vollstreckungstitel* [European Civil Procedural Law. A Commentary on the Brussels I Regulation, the Lugano Convention and the European Enforcement Order] (Frankfurt on Main, Verlag Recht und Wirtschaft 2005) p. 614.

service without proof of receipt is not admissible if the debtor's address is not known with certainty. According to Article 19 of the Regulation the debtor must be able to apply for a review of a judgment under the national law of the court seized if the document instituting the proceedings or the summons to a hearing has been served on the debtor according to one of the methods of service without proof of receipt and he can prove that the service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part. The debtor must still act promptly. As it is the case with service on a representative, Article 19 does not create a right for debtor to apply for a review of a judgment. The national law of the Member State of a court which has rendered the judgment, determines whether and how the review is to be effected. Since Article 19 is part of the minimum standards, the certification of a judgment will not be possible if the requirements of this Article have not been met and there is no possibility for review of the judgment.[24] This possibility of reviewing the judgment is to be created if the debtor was prevented from objecting the claim by *force majeure* or due to extraordinary circumstances without any fault on his part. In this case it is irrelevant how the document instituting the proceedings has been served. It is unclear what is meant by the notions '*force majeure*' and 'extraordinary circumstances'. The EC Court will have to determine what is to be understood with these notions.

The service of the document instituting the proceedings or the service of summons to a hearing with proof of receipt is dealt with in Article 13 of the Regulation. The purpose of this Article is that the document served has reached its addressee. Article 14 gives the alternative methods of service. It has to be borne in mind again that the alternative methods of service of Article 14 are not admissible, if the address of the debtor is not known with certainty. In my opinion this requirement will give rise to many interpretation questions. It is not clear what is meant by the notion 'certainty'. How certain must the creditor know the address of the debtor? It will be up to the EC Court to answer this question. There is a possibility that by using one of the methods provided for in Article 14 the served document does not reach the debtor. In that case the debtor is given a possibility of review of the judgment, since it might occur that the debtor did not receive the document in sufficient time to arrange for his defence. It is to be underlined that Article 19 does not require a full review. It is sufficient that the national law of the Member State of origin gives the debtor a right for a certain form of review of a judgment.[25]

The minimum standards regard also certain information to be provided to the debtor. In accordance with Articles 16 and 17 the debtor is to be sufficiently informed about the claim, as well as the procedural steps which he can

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24. Van der Grinten, op. cit. n. 21, at p. 78.

25. Contrary to Art. 19, if the requirements of Arts. 13 to 17 are not met, Art. 18 of the Regulation states that a judgment can still be certified as a European Enforcement Order under the condition that there is a possibility of full review of the judgment in the Member State of origin.

take to contest it. With regard to the information about the claim the names and addresses of the parties must be mentioned in the document served on the debtor, as well as the amount of the claim and the interest rate on the claim. It is remarkable that Article 16(c) states that the debtor does not have to be informed about the interest rate if the statutory interest is automatically added to the principal under the law of the Member State of origin. Firstly, the question whether statutory interest is added, is determined according to the governing law to the relationship between the creditor and the debtor.[26] This law does not have to be the law of the Member State of origin. Secondly, Article 16(c) presupposes that the debtor is aware of an automatic addition of statutory interest to the claim. This does not have to be the case.

The document instituting the proceedings or an equivalent document must also contain a statement of the reason for the claim. As regards the information on contesting the claim the debtor must be informed about how and where to contest the claim and whether it is mandatory to be represented by a lawyer. Some information on the consequences of an absence of objection or default of appearance must be provided to the debtor too. It is to be pointed out that most of the procedural law systems of the Member States do provide the debtor with information about the claim as mentioned in Article 16 of the Regulation. However, the problem might be the information required by Article 17 about the procedural steps against the claim and about the consequence of non-objection of the claim, since some legal systems do not provide the debtor with this information in the document instituting the proceedings on the claim. Article 17 should give a stimulus to the Member States to modify their legal systems according to the EEO Regulation.[27]

8. REMEDIES AGAINST THE CERTIFICATION OF A JUDGMENT AS A EUROPEAN ENFORCEMENT ORDER

In accordance with Article 10(4) of the EEO Regulation no appeal shall lie against the issuing of the EEO certificate. The question may arise whether the creditor is allowed to appeal if the certification of the judgment is refused. In legal literature it has been argued that Article 10(4) only prohibits an appeal against the granting of the EEO certificate. If the granting of the certificate is refused, Article 10(4) does not apply. Whether an appeal is possible, is to be answered according to the national law of the court seized.[28] However, in my

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26. See, e.g., Art. 10(c) of the Rome Contracts Convention 1980.

27. H. Tagaras, 'The "European Enforcement Order" (Regulation 805/2004)', in A. Nuyts and N. Watté, eds., *International Civil Litigation in Europe and Relations with Third States* (Brussels, Bruylant 2005) p. 585.

28. A. Stadler, 'Kritische Anmerkungen zum Europäischen Vollstreckungstitel', 50 *RIW* (2004) p. 804 and Rauscher, op. cit. n. 1, at p. 66.

opinion one should not rely on the national law. If the court has refused to issue the EEO certificate, the creditor can still apply for a new certificate. This new application will have to comply with the requirements laid down in the Regulation. If the court refused the issuing of the certificate, because the requirements are not met, the non-compliance with minimum standards cannot be rectified anymore. If the granting was refused because of a mistake in the application, the creditor can rectify the application to comply with the requirements. Since the EEO Regulation is complementary to the Brussels I Regulation, the creditor is not obliged to apply for a European Enforcement Order to enforce the judgment in another Member State. He can also choose for the recognition and enforcement of a judgment under the Brussels I Regulation in that state.

Article 10(1)(a) creates a possibility for a rectification of an EEO certificate when there is a discrepancy, due to a material error, between the judgment and the certificate. However, the term 'material error' is not clear. In my opinion this Article is applicable if there is a mistake in the certificate. For example, in filling the certificate the amount of the claim has not been given correctly. The court may not rectify the certificate *ex officio*. According to Article 10(1) the correction of the certification is to be applied for to the court of origin. If the certificate has been wrongly granted as regards the requirements for granting of the certificate, Article 10(1)(b) gives a possibility to apply for a withdrawal of the certificate as well. The law of the Member State of origin governs the rectification and withdrawal procedure. The competent court in both procedures is the court of origin, i.e., the court that has issued the EEO certificate.

9. ENFORCEMENT OF A JUDGMENT CERTIFIED AS A EUROPEAN ENFORCEMENT ORDER

A judgment certified as a European Enforcement Order can be enforced in another Member State without any need of exequatur. Through the certification it will become a judgment equal to the judgments of other Member States. As regards the enforcement of a certified judgment Article 20(1) of the EEO Regulation states that a certified judgment will be enforced under the same conditions as a judgment rendered by a court of the Member State of enforcement. The enforcement of the certified judgment is governed by the laws of the state of enforcement. This means that this law also governs the question how the assets of the debtor can be garnished or are to be garnished prior to the enforcement of the judgment, as well as the question whether an approval from a local court is needed to initiate the enforcement proceedings or whether a certified judgment can be directly handed over to an enforcement agent which can institute the enforcement proceedings.

There are very strict limited grounds for the refusal of enforcement of a certified judgment. According to Article 21 the enforcement of a certified judgment can, upon an application by a debtor, only be refused in case of irreconcilability of the certified judgment with an earlier judgment which has involved the same

cause of action and was given between the same parties. It is also required that the earlier judgment was given in the Member State of enforcement or fulfils the conditions for recognition in that Member State and the irreconcilability could not have been raised in the proceedings in the Member State of origin. However, the court seized in the Member State of enforcement may still not review the certified judgment as to the substance.[29] If an appeal is lodged against the certified judgment in the Member State of origin or if the rectification or withdrawal procedure in the Member State of origin has been applied for, the debtor may apply in the Member State of enforcement for a stay of the enforcement proceedings or for limiting the enforcement proceedings.

In legal literature the question has arisen whether the public policy of the Member State of enforcement may be invoked to refuse the enforcement of a certified judgment.[30] According to Article 34(1) of the Brussels I Regulation the recognition of a judgment of a court of a Member State may be refused if the recognition of the judgment is manifestly contrary to the public policy of the Member State of enforcement. The abolition of the public policy clause in the EEO Regulation has been heavily criticized especially in view of the enlargement of the European Union.[31] This is the reason why it has been suggested that in case of enforcement of a certified judgment in Germany the debtor may invoke the public policy clause from German national law, since the enforcement of a judgment is governed by the national law of the Member State of enforcement. In my opinion the public policy clause from national law may not be invoked, since it is clear from the preparatory works to the EEO Regulation that this possibility of refusing the enforcement has been rejected.[32] It is also to be pointed out that it is settled case law of the EC Court as regards public policy under Article 27(1) the Brussels Convention (cf., Art. 34(1) of the Brussels I Regulation) that the enforcement of the judgment has to infringe a fundamental principle in the state of enforcement. The infringement has to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.[33] According to this case law even a judgment which might be incompatible with the principles of free movement of goods and freedom of competition, does not alter the conditions for refusal of

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29. Art. 22 states that the EEO Regulation does not affect certain agreements on non-recognition of judgments from Member States rendered against defendants habitually resident in a third country.

30. T. Struycken, 'De openbare orde van de Europese Gemeenschap' [The Public Policy of the European Union], in Van der Grinten and Heukels, eds., op. cit. n. 21, at pp. 59-70. See also A. Stadler, 'Das Europäische Zivilprozessrecht – Wie viel Beschleunigung verträgt Europa?', 24 *IPRax* (2004) p. 2.

31. Stadler, loc. cit. n. 30, at p. 8.

32. See, e.g., the proposal for an amendment of the European Commission's proposal made in the European Parliament (PE 327.250/11-12, 26 February 2003).

33. ECJ Case C-7/98, *Krombach* v. *Bamberski*, [2000] *ECR* I-1935, *NILR* 2002 133.

recognition and enforcement under this Article.[34] The EC Court has ruled that the public policy clause is to be interpreted strictly. Although there is a reference to the national law in Article 20 of the EEO Regulation, in my opinion the national law cannot supersede the Regulation, even if there is a gap in the Regulation.[35] It is also to be borne in mind that a public policy clause is contrary to the purpose of the Regulation to simplify and to accelerate cross border enforcement of judgments within the European Union.

One could say that the lack of a public policy clause in the EEO Regulation is contrary to the fair trial principle as laid down in Article 6 of the European Convention on Human Rights. According to the case law of the European Court on Human Rights the judgment which is to be enforced, may only be reviewed in the state of enforcement as regards Article 6 ECHR if it is given in a procedure where the court of the state of origin was not bound by the provisions of the European Convention on Human Rights.[36] Since all the Member States of the European Union are party to the ECHR, the court of the Member States are bound by the principles laid down in this Convention.[37]

10. COURT SETTLEMENTS AND AUTHENTIC INSTRUMENTS UNDER THE EEO REGULATION

As previously mentioned a claim is uncontested within the meaning of the EEO Regulation if it has been expressly agreed to in a court settlement or in an authentic instrument. According to Article 24 a court settlement on an uncontested claim may be certified as a European Enforcement Order. The EEO certificate is to be issued upon an application to the court which approved the court settlement or in which it has been concluded. To enforce a certified court settlement in another Member State a declaration of enforceability is neither required nor may the recognition be opposed. The enforcement of a certified court settlement is governed by the national law of the Member State of enforcement.

According to Article 25 an authentic instrument may be also certified as a European Enforcement Order. The authentic instrument is defined as a document formally drawn up or registered as an authentic instrument. The authenticity of the instrument has to relate to the signature and the content of the instrument. The document has to be established by a public authority empowered for that purpose.[38] Also an arrangement relating to maintenance

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34. ECJ Case C-38/98, *Renault* v. *Maxicar*, [2000] *ECR* I-2973.
35. Stein, loc. cit. n. 16, at p. 186 *contra* Stadler, loc. cit. n. 30, at p. 8.
36. ECHR 20 July 2001, Application No. 30882/96, *Pellegrini* v. *Italy*.
37. See also Stein, loc. cit. n. 16, at p. 186.
38. See in this respect also the judgment of the EC Court in the *Unibank* v. *Christensen* case (Case C-260/97, [1999] *ECR* I-3715).

obligations concluded with an administrative authority constitutes an authentic instrument within the meaning of the Regulation. The EEO certificate is to be issued by an authority which is empowered in the Member State of origin to do so, not necessarily a court. For example, according to the German and Austrian Acts implementing the EEO Regulation, a notarial deed is to be certified by the notary that has concluded the deed.[39] However, according to Dutch law the EEO certificate to a notarial deed concerning an uncontested claim is to be issued by a local court (*voorzieningenrechter*) of the place where the notary concluding the deed is established.[40] Once an authentic instrument has been certified, there is no need for a declaration of enforceability in the Member State of enforcement. The national law of that state governs the enforcement of a certified authentic instrument.

The enforcement of a certified court settlement or authentic instrument may not be refused on the ground that it is irreconcilable with a judgment. The enforcement proceedings may only be stayed or limited to protective measures under Article 23 of the EEO Regulation, if a rectification or withdrawal of the EEO certificate in the Member State of origin has been applied for.

11. EEO REGULATION AND THE BRUSSELS I REGULATION

In the introductory chapter to the EEO Regulation it has been already pointed out that according to Article 27 of the EEO Regulation this Regulation does not affect the Brussels I Regulation. This may give rise to the question of added value of the EEO Regulation. Since the EEO Regulation does not supersede the Brussels I Regulation, the creditor may choose either to apply for an EEO certificate in the Member State of origin or to apply for an exequatur in the Member State of enforcement. In my opinion the exequatur can also be applied for, if the certification of a judgment is refused in the Member State of origin. The creditor's decision which way of enforcement to choose, will depend in most cases from the costs of the application for an EEO certificate and for an exequatur. The Brussels I Regulation remains applicable to judgments which do not fall within the scope of the EEO Regulation.

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39. § 1079(2) of the German *Zivilprozessordnung* (German Code of Civil Procedure) and § 3b of the *Notariatsordnung* (Austrian Notary Act).

40. Art. 7 of the *Uitvoeringswet verordening Europese executoriale titel* (the Dutch Act on Implementing of the EEO Regulation) (*Staatsblad* 2005, No 485).

12. PROPOSALS FOR HARMONISATION OF THE PROCEDURAL LAWS OF THE MEMBER STATES

The simplification of cross border enforcement can also be achieved by harmonizing the procedural laws of the Member States. One of the attempts is the proposal for a Council Regulation on maintenance obligations.[41] This Regulation should cover not only the questions of recognition and enforcement of judgments and authentic documents in matters relating to maintenance obligations, but also the jurisdiction of the courts of the Member States as well as the determination of the applicable law in these matters.[42] The proposed Regulation supersedes the existing instruments which can apply in matters relating to maintenance obligations, especially the Brussels I Regulation as regards the jurisdiction and the EEO Regulation as regards the enforcement of a judgment from a court of a Member State in another Member State. It introduces a new system for recognition and enforcement of judgments. As it is mentioned in the 18th recital of the Preamble of the Regulation the intermediate procedures are to be abolished. However, this can only be realized if the procedures in which the decisions in the maintenance matters are rendered, are almost equal in all Member States. This is – *inter alia* – a reason for a minimum harmonisation of the requirements for the service of documents instituting the proceedings on a maintenance claim in a Member State as well as of the requirements of fair trial which are to be met in the court proceedings. Article 22 of the proposed Regulation gives a list of methods by which a document instituting the proceedings on a maintenance claim has to be served on a defendant. The goal of these methods is that this document has reached the addressee, i.e., the defendant. Article 22 paragraph 2 harmonizes the time limit given to the defendant for preparation of his defence. It states that the defendant shall have at least 30 days for preparation of his defence. Once an enforceable judgment is rendered by a court of a Member State, according to the proposed Regulation no declaration of enforceability is needed for the recognition of this judgment in another Member State. It is not even possible to oppose the recognition. A judgment in matters relating to maintenance obligations is recognised in another Member State even without an EEO certificate. This means that judgments in maintenance matters become equal all over the European Union. One could say that the enforcement in Amsterdam of a judgment on a maintenance claim rendered by a court in Berlin is effected in the same way as the enforcement in Amsterdam of a judgment of the District Court of The Hague. There are no barriers and controls in case of cross border enforcement of these judgments. These are not necessary, since

41. Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 def.

42. The rules on jurisdiction and conflict of laws in the proposed Regulation are not dealt with in this article.

the judgments in the maintenance matters are to be given in – partially – harmonised procedures. The proposed Regulation does not deal with the enforcement of the judgments. The procedure of enforcement remains governed by the law of the Member State of enforcement. In certain cases it is possible to refuse or suspend the enforcement of a judgment from a court of another Member State. However, under no circumstances a review of the judgment as to the substance is allowed. The new introduced system goes further than the EEO Regulation. It presupposes that the courts of the Member States will always apply the rules of the Regulation. But there is no control mechanism in the Regulation to verify whether the court seized on a maintenance claim applied the rules correctly. Under the EEO Regulation the court seized for certification still has to determine whether the judgment and the proceedings comply with the requirements of the EEO Regulation. One could say that the principle of mutual trust in procedural law systems in the Member States as embodied in the proposed Regulation on maintenance matters goes too far. The defendant is obliged to challenge the judgment in the Member State of origin, if in his opinion the court in the Member State of origin has not applied the provisions of the Regulation correctly. However, if the judgment is enforceable according to the law of the Member State of origin, it can still be enforced in another Member State despite of a challenge of the judgment in the Member State of origin. It is to be pointed out that the aim of the proposed Regulation is to enable the maintenance creditor to enforce a judgment in a fast and simplified way without any obstructions by the debtor. The creditor is to be seen as a weaker party which needs more protection than the debtor.

According to the Tampere Conclusions and according to the programme for measures to implement the principle of mutual recognition of judgments in civil and commercial matters, cross border enforcement of judgments in the European Union is also to be accomplished by the adoption of a procedure according to which a European Payment Order can be issued.[43] In accordance with this proposed Regulation for enforcement of a payment order rendered according to this Regulation neither a European Enforcement Order in the Member State of origin nor an exequatur in the Member State of enforcement is required. Since this payment order is issued in a harmonised European procedure which will be the same in all Member States, there is no need of any declaration of enforceability in the Member State of origin or in that of enforcement. The order is given in a procedure which is instituted upon an application of the creditor in cross border cases. The court seized issues a European Payment Order which can be opposed. The requirements of the opposition against the European Payment Order are limited to an indispensable minimum. The debtor is given certain time to communicate to the court his objections against the

43. COM (2004) 173 def. See also the amended proposal for this Regulation COM 2006 (57) def.

payment order by filling-up a standard form that is sent to him together with the order. He does not have to explain why he is objecting the claim or the order. The opposition by the debtor brings the procedure for a European Payment Order to an end and transfers it to ordinary civil proceedings, unless the creditor has explicitly requested to terminate the proceedings in case of objection by the debtor. The proposed Regulation deals neither with the jurisdiction of the court seized nor with the service of court documents. As regards the jurisdiction it has been suggested that only the court of the debtor's domicile should have jurisdiction to issue a European Payment Order. This proposal had been rejected by the European Commission. Only if the debtor is a consumer residing in a Member State, the European Payment Order may be granted by the court of the debtor's domicile. The jurisdiction of the court seized for a European Payment Order is to be determined in accordance with the applicable jurisdiction rules of the Member State of the court seized. The service of court documents is governed by the applicable provisions of the national law of a Member State where a request for a European Payment Order was made.

Additionally, the proposed Regulation for a European Small Claims Procedure institutes a procedure where a judgment is rendered, for enforcement of which in another Member State no declaration of enforceability is needed nor a European Enforcement Order is required.[44] The procedure has to simplify and accelerate litigation concerning small claims and further reduce the costs.[45] Under the European Small Claims Procedure the debtor has only one possibility to oppose the claim. If he does not do so or if his objections against the claim are rejected, an enforceable judgment is given.

The proposed Regulations do not affect the Brussels I Regulation and the EC Service Regulation. If the proposed instruments would interfere with these Regulations the smooth functioning of the European instruments would be hampered.

13. CONCLUDING REMARKS

The purpose of all mentioned Regulations is the strengthening of the application of the principle of mutual trust in the administration of justice in the Member States by further simplification of the recognition and enforcement of judgments in the European Union. It is to be pointed out that according to the mentioned programme for implementing the principle of mutual recognition of judgments in civil and commercial matters the EEO Regulation is meant to be a 'pilot project'. The next step is the extension of the scope of this Regula-

44. COM (2005) 87 def.

45. It is still not clear what is to be understood by the notion 'small claim'. The European Commission has proposed that a small claim should be a claim which does not exceed € 2,000.

tion to contested claims as well as to the matters which fall outside the scope of the Regulation. An example of application of the system of recognition and enforcement of judgments as laid down in the EEO Regulation to a subject falling outside the scope of this Regulation is the system of recognition and enforcement of judgments in matters concerning rights of access and the return of a child as dealt with in Articles 40 to 45 of the Brussels IIA Regulation. The proposal for the Regulation on maintenance obligations also is to be mentioned, since it excludes maintenance matters from the application scope of the EEO Regulation. In my opinion, maintenance matters should not be excluded from the EEO Regulation yet. Firstly, because of the lack of a control mechanism in the proposed Regulation which is still necessary, since the legal practitioners are not used yet to the abolishing of exequatur as introduced by the EEO Regulation. One also could question whether in case of harmonisation of the rules on recognition and enforcement in the European Union, this harmonisation should not be regulated in one instrument instead of instruments dealing with different subjects. However, it should be pointed out that the publication of the proposal for a regulation on maintenance matters underlines the importance of the EEO as a commonly accepted idea of simplification of cross border enforcement as well as a step towards one judicial area in the European Union. As it already has been mentioned, this proposal goes further than the EEO.

The extension of the scope and the further strengthening of the principle of mutual trust are not possible without partial harmonisation of the procedural laws of the Member States. If the procedural laws of the Member States are harmonised, the rights created by the substantive law can be enforced in each Member State in the same manner. Harmonisation of the laws of the Member States is not only necessary for the proper functioning of the internal market of the European Union but also for developing and maintaining an area of freedom, security and justice as one of the objectives of the European Union. The harmonisation of the procedural laws of the Member States may lead to the abolishing of any intermediate procedure regarding the cross border enforcement of judgments. It may result in a 'full faith and credit' clause for judgments given by courts of the Member States. In accordance with this clause all judgments would become equal. One would no longer distinguish in the Member State of enforcement between judgments from courts of the Member State of enforcement and those from courts of other Member States.